Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH ARPAIO,
MARICOPA COUNTY SHERIFF
IN HIS OFFICIAL CAPACITY,
MARICOPA COUNTY,

Petitioners,

v.

JANE DOE,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ARIZONA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Maricopa County Jail maintains a policy prohibiting all off-site transportation for prisoners seeking to obtain non-therapeutic medical procedures including non-therapeutic abortions. Prisoners seeking transport can bypass the policy by obtaining a court order compelling transport. This case presents the following questions:

(1) Whether, under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the subject prison policy imposes an "undue burden" on a female inmate's right to choose to terminate her pregnancy where not medically necessary, and, if so, then

(2) Did the court below err in holding, in harmony with the Fifth Circuit, but in conflict with the Third Circuit, that a policy prohibiting off-site transport of prisoners for non-therapeutic abortions is unconstitutional under the standard of scrutiny set forth in *Turner v. Safely*, 482 U.S. 78 (1987)?

ALL PARTIES TO THE PROCEEDINGS

Joseph Arpaio, Maricopa County Sheriff in his official capacity

Maricopa County, Arizona

Jane Doe, individually and on behalf of all others similarly situated

DISCLOSURE STATEMENT PER RULE 29.6

There is no parent corporation or public company related to the parties in this case.

Page

TABLE OF CONTENTS

Questions Presented i
All Parties To The Proceedings ii
Disclosure Statement Per Rule 29.6 ii
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Constitutional Provisions Involved 2
Statement Of The Case 2
Reasons For Granting The Petition 5
I. Whether and to What Extent the Right to Choose Survives Incarceration Raises Important Constitutional Questions Needing Supreme Court Resolution 5
A. Undue Burden Analysis as Applied in Prison Context 5
B. *Turner* As Applied to Abortion 9
II. Federal Circuits Are Split on the Questions Presented 12
A. The *Monmouth* and *Victoria W* Cases 13
B. Other Decided and Currently Pending Cases 17
III. The Lower Court Anaysis In This Case Was Manifestly Erroneous 18
A. Arizona Courts' Manifestly Erroneous Undue Burden Analysis 18
B. The Lower Court Substituted Its "Easy Alternative" and Defied the Deference

Page

Required by a Proper Application of *Turner* 19

Conclusion 21

APPENDICES:

Appendix A — Arizona Supreme Court Order filed Sept. 26, 2007, denying petition for review 1a

Appendix B — Arizona Court of Appeals Opinion filed Jan. 23, 2007, affirming injunction of policy 3a

Appendix C — Maricopa County Superior Court Order filed Oct. 31, 2005, enjoining policy 24a

Appendix D — Maricopa County Superior Court Minute Entry filed Aug. 25, 2005, granting summary judgment 27a

TABLE OF AUTHORITIES

Cases:

Beard v. Banks, 126 S. Ct. 2572 (2006) 9, 10, 20

Bell v. Wolfish, 441 U.S. 520 (1979) 9, 10

Block v. Rutherford, 468 U.S. 576 (1984) 20

Doe v. Arpaio (Arpaio I), No. CV 2004-009286, 2005 WL 2173988 (Ariz. Super. Ct. Aug. 25, 2005) 1, 18, 19

Doe v. Arpaio (Arpaio II), 214 Ariz. 237, 150 P.3d 1258 (Ct. App. 2007) 1, 19

Doe v. Barron, 92 F. Supp. 2d 694 (S.D. Ohio 1999) 5, 17

Cases, continued: Page

Doe v. Bolton, 410 U.S. 179 (1973) 6

Harris v. McRae, 448 U.S. 297 (1980)..... 8, 11

Hudson v. Palmer, 468 U.S. 517 (1984) 10

Johnson v. California, 543 U.S. 499 (2005) 10

Maher v. Roe, 432 U.S. 464 (1977)..... 7

Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987) 2, 5, 12-15, 17

Overton v. Bazzetta, 539 U.S. 126 (2003).... 10, 16, 20

Planned Parenthood v. Casey, 505 U.S. 833 (1992)..... 2, 6, 13, 19

Roe v. Crawford, 439 F. Supp. 2d 942 (W.D. Mo. 2006)..... 5, 18

Roe v. Leis, No. C-1-00-651, 2001 WL 1842459 (S.D. Ohio Jan. 10, 2001)..... 5, 17

Simat Corp. v. Ariz. Health Care Cost Containment Sys., 203 Ariz. 454, 56 P.3d 28 (2004) 4

Turner v. Safely, 482 U.S. 78 (1987) 2, 3, 6, 13, 19

Victoria W v. Larpenter, 369 F.3d 475 (5th Cir. 2004) 2, 5, 12-17

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 7, 11

Statutes:

28 U.S.C. §1257..... 1

Ariz. Rev. Stat. Ann. §35-196.02..... 4

PETITION FOR A WRIT OF CERTIORARI

Sheriff Joseph Arpaio and Maricopa County (collectively the "County defendants") respectfully petition for a writ of certiorari to review the judgment of the Arizona Court of Appeals.

OPINIONS BELOW

The trial court decision (App. D) granting summary judgment to Respondent Doe is unpublished, but can be accessed electronically at *Doe v. Arpaio (Arpaio I)*, No. CV 2004-009286, 2005 WL 2173988 at *3 (Ariz. Super. Ct. Aug. 25, 2005). The injunction entered to prevent enforcement of the subject policy is also included in the separate appendix. App. C. The Arizona Court of Appeals opinion affirming the decision (App. B) is published in the Arizona and Pacific reporters at *Doe v. Arpaio (Arpaio II)*, 214 Ariz. 237, 150 P.3d 1258 (Ct. App. 2007). The Arizona Supreme Court entered an order denying review of the Arizona Court of Appeals' decision on September 25, 2007. App. A.

JURISDICTION

The judgment the County defendants seek to have reviewed was entered in the Arizona Court of Appeals on January 23, 2007. App. B. The Arizona Supreme Court denied a timely petition for review on September 25, 2007. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the Fourteenth Amendment Due Process Clause:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case concerns whether a prison's unwritten policy (the "Policy") denying inmate requests for transport outside the jail facility to obtain non-therpeutic medical procedures, including non-therapeutic abortions, violates the Fourteenth Amendment. Two federal circuits have divided on this issue. *Compare Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (invalidating similar policy) *with Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004) (upholding similar policy). To date, the split remains unresolved. The Arizona Superior Court (the trial court) enjoined the County defendants from enforcing the subject Policy holding, ipso facto, that "any delay" in obtaining a requested abortion constitutes an unconstitutional "undue burden." App. D. The Arizona Court of Appeals then ruled that the *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) "undue burden" analysis was inapplicable, holding instead that the validity of prison regulations is determined solely by application of the "legitimate penological interests" analysis set forth in *Turner v. Safely*, 482 U.S. 78 (1987). App. B. Substituting its own "easy alter-

native" for that of the prison officials here, the Arizona Court of Appeals then held that the Policy represented an "exaggerated response" to the stated penological objectives advanced to support it. *Id.* The Arizona Supreme Court declined to grant review. App. A. This Court's review is needed to resolve the issues presented.

The subject "Policy" is that Maricopa County Jail inmates seeking any non-therapeutic medical procedure, including but not limited to non-therapeutic abortions, are required to get a court order directing the Sheriff's office to provide transport off-site from the jail for them to obtain the procedure.[1] App. B. The reasons for the Policy include safety, liability, and budget concerns. *Id.* According to the affidavit testimony of Captain Kelch, one of the "authors" of the Policy, the Policy was developed during the administration of a prior Sheriff:

> to promote the safety of the office and to prevent the sheriff's office from having any exposure to liability that may arise from such a transport. . . . If we do not have to or need to transport an inmate outside of the jail facility then we will not do so as it significantly decreases the risks associated with outside transports.

Former Maricopa County Counsel MacIntyre, the other "author" of the Policy, also testified by deposition that,

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[1] Medical personnel with Correctional Health Services ("CHS") determine whether a jail inmate, including a pregnant inmate, needs any particular medical services. App. B. In that context, nonparty CHS determines whether an inmate needs to be transported for medical care. *Id.* CHS only seeks transport for medically necessary procedures. The Policy does not apply "where a pregnant inmate needs to have an abortion because her life or health is at risk." *Id.* That would be regarded as a medically necessary procedure.

at the time of adoption of the Policy, government resources could not be expended for elective medical procedures. *See* Ariz. Rev. Stat. Ann. §35-196.02, *held unconstitutional on state law grounds, Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 56 P.3d 28 (2004) (Arizona statute prohibiting use of public resources for abortion procedure unless necessary to save the life of the pregnant woman).

Shortly before her incarceration, plaintiff Doe learned that she was pregnant. App. B. She advised jail personnel of her desire to terminate her pregnancy. *Id.* Pursuant to the Policy, plaintiff Doe was advised that she would need to obtain a court order for transport for an elective medical procedure. *Id.* Plaintiff's attorney filed an unopposed motion which was unsuccessful, then declined further representation.[2] *Id.* Ms. Doe obtained other counsel and filed this action challenging the Policy. *Id.*[3] Following cross motions for summary judgment, the trial court granted judgment in favor of plaintiff Doe and against defendants Maricopa County and Sheriff Arpaio. *Id.* The Arizona Court of Appeals affirmed the decision (App. B) and the Arizona Supreme Court denied discretionary review. App. A.

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[2]The court commissioner who denied the unopposed motion believed she did not have authority to order transport for an elective medical procedure. *Id.*

[3]Ms. Doe sought a temporary restraining order so that she would be provided transport to and from the jail to obtain a scheduled abortion. App. B. That same day, with counsel present and no opposition, the court ordered Doe's transport to obtain the procedure. Plaintiff Doe obtained the abortion. *Id.* The lower court decided not to treat the issue as moot.

REASONS FOR GRANTING THE PETITION

I.
WHETHER AND TO WHAT EXTENT THE RIGHT TO CHOOSE SURVIVES INCARCERATION RAISES IMPORTANT CONSTITUTIONAL QUESTIONS NEEDING SUPREME COURT RESOLUTION

Review is necessary to resolve the "important question[s] of federal law" that have not yet been "but should be settled by this Court." Sup. Ct. R. 10(b). This case involves the scope of abortion rights, and the application of those rights, whatever their scope, in the unique prison context. As is evident from the split in the federal circuits described in detail below, the issues presented here cannot be resolved without Supreme Court intervention.

A. Undue Burden Analysis as Applied in Prison Context

The cases addressing similar prison policies affecting an inmate's decision to terminate her pregnancy,[4] all have essentially overlooked the importance of the *Casey* constitutional "undue burden" analysis required before reaching the *Turner* test. Despite this oversight, *Casey*'s constitutional analysis is essential to a complete evaluation of the validity of the policy at issue.

The Court's *Turner* test is not derived from the line of abortion cases. It is a test of prison regulations and applies only after a constitutional infringement is first

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[4]*See Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Victoria W v. Larpenter*, 369 F.3d 475 (5th Cir. 2004); *Roe v. Crawford*, 439 F. Supp. 2d 942 (W.D. Mo. 2006); *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999); *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459 at *1 (S.D. Ohio Jan. 10, 2001).

found to exist. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to a legitimate penological interest." *Turner v. Safely*, 482 U.S. 78, 89 (1987) (emphasis added). Stated simply, there is a clear sequence: (1) does the subject prison regulation impinge on an inmate's constitutional rights; if so, then (2) is it reasonably related to legitimate penological interests? If a prison regulation does not infringe a constitutional right, then the analysis ends there without reaching the *Turner* factors. Thus, before reaching *Turner* it is essential first to ask and answer the threshold constitutional question: does the policy impose an undue burden on an incarcerated inmate's right to choose to terminate her pregnancy?

In *Casey*, this Court made a point to recognize that "[a]ll abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy." *Casey*, 505 U.S. at 875. "Not all burdens on the right to decide whether to terminate a pregnancy will be undue," and "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right." *Id.* at 873. "[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

With the recognition that some level of restriction on the abortion decision is permitted, this Court's line of abortion cases may be divided into two separate categories: (1) those cases involving laws that affirmatively restrict or prohibit abortions and (2) those cases involving laws that fail to facilitate or otherwise assist in implementing the decision to abort. While this Court has often held restrictions imposing a "substantial

obstacle" on the abortion right unconstitutional, it has, with complete consistency, held that a state's failure to facilitate implementation of the decision is not unconstitutional.

An example of a case falling in the latter category is *Maher v. Roe*, 432 U.S. 464 (1977). There the plaintiffs were indigent women challenging Connecticut's law prohibiting government funding (Medicaid) of non-therapeutic abortions. They argued that elimination of such funding was a state-created obstacle burdening indigent women and effectively making it impossible for them to carry out a decision to seek an abortion. The Supreme Court held that the state could lawfully withhold funding for elective abortions although that might "make it difficult and in some cases, perhaps, impossible for some women to have abortions." *Id.* at 474. The Court determined that the pregnant woman's indigency, not the state regulation, created the obstacle.

A similar analysis was applied in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 507 (citation omitted). "If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' . . . surely it may do so through the allocation of other public resources, hospitals and medical staff." *Id.* at 510 (citation omitted).

As the Court stated in *Casey*, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abor-

tion cannot be enough to invalidate it." 505 U.S. at 874. For instance, the Court in *Casey* acknowledged that its decision reaffirmed "that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id.* at 899. Thus, obtaining a court order in connection with seeking an abortion is not, ipso facto, an undue burden. Moreover, the fact that obtaining a judicial bypass order necessarily involves some delay, does not make that procedure an undue burden.

In *Casey* the Court upheld a mandatory waiting period requiring that at least 24 hours before the abortion, the woman be advised of the gestational age of the fetus and of the health risks associated with both abortion and childbirth. Thus, both the delay required for testing the gestational age of the fetus and the minimum 24 hour delay for the mandatory waiting period were obvious delays which the *Casey* Court did not find to be undue burdens. "We do not doubt that, as the District Court held, the waiting period has the effect of 'increasing the cost and risk of delay of abortions.' " 505 U.S. at 885-87 (emphasis added). Thus, delay is not synonymous with undue burden.

Similarly, having a court authorize a transport order for an inmate to be able to leave the jail and receive an elective medical procedure is not an undue burden. As this Court has long recognized, while a woman has a "fundamental" right to make the decision, "it does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Harris v. McRae*, 448 U.S. 297, 316 (1980). Following *Harris*, it would seem that public prison officials are

similarly under no obligation to assist a female inmate in implementing her decision by providing her with the financial and other resources necessary to "avail herself of the full range of protected choices" notwithstanding her confinement. This is because it is the condition of confinement brought on by the inmate's criminal conduct that self-imposes a burden on her ability to exercise the right, not the actions of the prison officials in carrying out their duty to prevent her from leaving the jail once she is incarcerated. As explained in *Casey*, the fact that the transport Policy incidentally may make it more difficult to obtain an abortion does not invalidate the Policy. The evidence suggests that, in the past, despite application of the Policy, every inmate who has requested transport for such a procedure has been accommodated once a court order is obtained. The Policy, therefore, imposes no "undue" burden and is a constitutionally permissible regulation. The Arizona courts should have upheld the constitutionality of the Policy without even reaching a *Turner* analysis.

B. *Turner* As Applied to Abortion

Even assuming *Turner* must be considered, a hallmark of *Turner* has always been deference to the decisions of prison officials. This Court has long recognized that the judiciary is ill-equipped to handle the problems posed by prison administration. "Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." *Bell v. Wolfish*, 441 U.S. 520, 548 n.30 (1979) (citation omitted). "Judicial scrutiny of prison regulations is an endeavor fraught with peril." *Beard v. Banks*, 126 S. Ct. 2572, 2582 (2006)

(Thomas, J., concurring in judgment). Flowing from this recognition is the generally accepted principle that imprisonment is fundamentally at odds with the free exercise of many constitutional protections and that, when inconsistent with penological objectives, some of those protections simply do not survive incarceration at all.[5] "Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility." *Bell*, 441 U.S. at 537. "The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). "[I]mprisonment carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). Accordingly, the question under *Turner* is necessarily bifurcated: (1) do prisoners possess a right to a purely non-therapeutic abortion and (2) if so, to what extent does that right trump a prison's otherwise legitimate policies?

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[5] Indeed, Justices Thomas and Scalia have long recognized that, apart from the Eighth Amendment prohibition on cruel and unusual punishment, the Constitution does not otherwise contemplate the free exercise or retention of "fundamental" rights by incarcerated individuals. In recognizing the Eighth Amendment limits of prisoners' rights, Justices Thomas and Scalia have also identified the severe consequences of the judiciary's attempts to intervene and reinstate such rights nevertheless. *See Beard*, 126 S. Ct. at 2582 (2006) (Thomas, J., concurring in judgment) (discussing violent backlash after court invalidated racial segregation policy in California prison). *See also Johnson v. California*, 543 U.S. 499 (2005).

The Maricopa County Jail does not perform abortions within its facility. Consequently, a final determination in favor of plaintiff Doe is necessarily a final determination that the County defendants are constitutionally required to transport prisoners to an off-site facility to obtain the desired procedure or, in the alternative, to equip themselves to begin performing abortions inside the jail upon request by a pregnant inmate. Forcing a state prison to perform the abortion procedure inside its facility is obviously at odds with the long line of precedent expressly holding that the state has no such obligation.[6] The alternative — forced off-site transport to an unsecure abortion clinic of the inmate's choice — is also obviously at odds with the primary penological objective of this and indeed all prisons — confinement. In fact, no Supreme Court decision premised on *Turner* has ever required prison officials to go to such lengths to accommodate prisoners wishing to exercise their constitutional rights in the absence of a finding that the desired procedure is medically necessary, thus implicating the Eighth Amendment. Consequently, if this Court were to mandate that the abortion procedure be provided to incarcerated inmates either on-site or off-site, it would essentially have to designate all non-therapeutic abortions as "serious medical needs" subject to an Eighth Amendment analysis rather than scrutiny under *Turner*.

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[6]The state may choose not to provide public funding for abortions. *Harris v. McRae*, 448 U.S. 297 (1980). The state may choose not to permit public funds, employees, or facilities to be used for, or to assist in performing, non-therapeutic abortions. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). In fact, the state may adopt a policy favoring childbirth over abortion and implement that policy. *Id.* at 508-10. "*Maher*, *Poelker*, and *McRae* all support the view that the State need not commit any resources to facilitating abortions." *Id.* at 511.

The constitutional questions presented by the abortion cases arising within the prison system are important ones. The *Turner* test has never before been analyzed by this Court in an abortion context. This Court should grant review to determine whether and to what extent the right to seek a non-therapeutic abortion survives incarceration and whether and to what extent prison officials must accommodate a prisoner's exercise of that right if it does.

II.
FEDERAL CIRCUITS ARE SPLIT ON THE QUESTIONS PRESENTED

The constitutional quandary presented in this case is a necessary consequence of attempting to accommodate constitutional rights without undermining prison administration. The Policy at issue calls for the Court to address the extent to which a state's discretion to implement regulations and policies necessary to assure the safe and efficient administration of its prison system must yield to a woman's decision to abort her pregnancy. The question has produced a split between the Third and the Fifth Circuits. *See Monmouth County Corr. Institutional Inmates v. Lanzaro*, 334 F.2d 326 (3d Cir. 1987); *Victoria W v. Larpenter*, 369 F.3d 475 (5th Cir. 2004). Yet unresolved, the circuit split on these issues has forced lower federal and state courts now considering the issue to choose sides in the split and, more fundamentally, in the underlying juridical conflict: Which interest should prevail — a woman's right to choose or a prison's right to regulate? Accordingly, this Court's review is warranted. *See* Sup. Ct. R. 10(a) (review proper when "a

United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").

A. The *Monmouth* and *Victoria W* Cases

In *Monmouth*, the Third Circuit addressed a policy similar to that at issue here, which restricted inmate transport outside the Monmouth County jail for non-therapeutic abortions absent a court order. 834 F.2d at 334. Without conducting the "undue burden" analysis (as *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) had not yet been decided), the Third Circuit applied *Turner v. Safely*, 482 U.S. 78 (1987) (decided the same year as *Monmouth*) to determine whether the policy could pass constitutional scrutiny as "rationally related to legitimate penological interests." The *Monmouth* court ultimately concluded that the prison's policy must yield to the incarcerated woman's decision to terminate her pregnancy. *Monmouth*, 834 F.2d at 326. Fifteen years later, in *Victoria W*, the Fifth Circuit addressed a similar prison policy. 369 F.3d at 479. The Fifth Circuit took a fundamentally different approach to the *Turner* test and, consequently, reached the opposite result. A close comparison of their analyses demonstrates the fundamental divergence between these circuits over the application of *Turner* to abortion rights in the prison context.

Under *Turner*, a prison policy that infringes a constitutional right is nevertheless valid if the policy is "rationally related to legitimate penological interests." *Turner*, 482 U.S. at 89. *Turner* focused on four elements: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate govern-

mental interest put forward to justify it," (2) "whether there are alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) "the absence of ready alternatives." *Id.* The divergence between *Monmouth*'s and *Victoria W*'s application of *Turner* is apparent from a step-by-step comparison of their analyses of these four elements.

On the first element — whether a policy prohibiting transport for non-therapeutic abortions had "a valid rational connection" to the interests advanced to support the policy — *Monmouth* and *Victoria W* reached opposite conclusions. The Third Circuit summarily dismissed the "financial and administrative burdens" advanced to support the Monmouth policy as presumptively illegitimate. "We agree with the district court that, at the threshold, the County's articulated objection to the costs of providing MCCI [the subject jail] inmates with abortion-related services independently fails to state a legitimate governmental interest sufficient to justify the County's policy." *Monmouth*, 834 F.2d at 336. In *Victoria W*, by contrast, the Fifth Circuit recognized that the interests advanced in support of the prison policy were presumptively valid. "It is the inmate's burden to disprove the validity of the regulation." *Victoria W*, 369 F.3d at 484. In so doing, the Fifth Circuit upheld financial and administrative burdens as legitimate interests advanced to support the policy. "The policy aims to reduce the total number of off-site transports and thereby reduce the effects on prison resources, inmate security, and potential liability." *Id.* at 486-87.

On the second *Turner* factor — "whether there are alternative means of exercising the right that remain open to prison inmates" — *Monmouth* and *Victoria W* also disagreed. *Monmouth* found that the court order alternative to the policy denying transport for abortions was an insufficient alternative for pregnant inmates wishing to terminate their pregnancies. The Third Circuit cited time constraints and possible delay in obtaining the needed order as defeating the legitimacy of the court order alternative. "[I]nmates imprisoned for less serious offenses are exposed to an unconstitutional risk of delay under the County's court-ordered release requirement and have no viable alternative available." *Monmouth*, 834 F.2d at 339. *Victoria W*, by contrast, found the court order requirement was sufficient as an "alternative means of exercising the right." "Elective treatment is not prohibited, although not viable within the prison. Rather, an inmate can receive the treatment by following a set procedure." *Victoria W*, 369 F.3d at 486.

In evaluating the third *Turner* factor — what impact accommodation of the right to terminate one's pregnancy would have on inmates and prison personnel — the *Monmouth* court fashioned this element of the test into a basis for requiring funding for abortions. "[P]roviding an inmate who elects to have a nontherapeutic abortion with both transportation to an appropriate medical facility and the necessary funding for the procedure will not burden 'the use of the prison's limited resources.' " *Monmouth*, 834 F.2d at 341. *Victoria W* again reached the opposite conclusion.

> Victoria contends that the prison would have lost no resources by transporting her to the abortion

> clinic because Victoria was willing to pay for the procedure and the cost of the guard. This fact mitigates one concern underlying the policy — the resources lost by the prison — but it ignores the fact that the prison is still either short-handed or out the cost of added personnel. It also forgets that the policy's simple means of reducing potential liability of the Parish is avoiding unnecessary transports.

Victoria W, 369 F.3d at 487 (emphasis added).

On the fourth and final *Turner* factor — an absence of alternative means of exercising the right[7] — *Monmouth* and *Victoria W* also diverge. The *Monmouth* court simply applied its conclusions from the prior three elements to eliminate the fourth one.

> MCCI [jail] inmates seek provision of all medical services related to their pregnancies — including abortion-related services — on the same terms that medical services are currently provided to pregnant inmates who opt to give birth. As indicated above, we perceive no significant disruption of valid penological interests that would accompany the provision of the requested services.

834 F.2d at 344. *Victoria W* recognized the court order alternative as a viable means of exercising the right "by following a set procedure," which was to file a motion, schedule a hearing, then get an order. 369 F.3d at 486.

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[7]The fourth factor is not a requirement that the government only impose a lesser alternative regulation, but rather "asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a de minimis cost to the valid penological goal." *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003). This is a "high standard" imposed on the prisoner, not the state, to identify such "ready alternatives." *Id.*

The *Victoria W* court held that the challenger did not meet the burden of showing no more than de minimis costs to the prison's liability concerns and that in any event "a ready alternative is only some evidence affecting the reasonable relationship standard; it is not dispositive." *Id.* at 487. Thus, on this final *Turner* factor, the two cases are also diametrically opposed.

The *Monmouth* and *Victoria W* decisions place the Third and Fifth Circuits in dramatic conflict on a federal constitutional question. The cases scrutinized comparable policies, but exhibit a fundamental departure in their interpretation of *Turner*. More specifically, when compared, these cases illustrate the difficulty in determining what level of deference is due to prison officials when their policies and regulations affect a prisoner's exercise of a constitutional right. The question is further complicated when, as here, exercise of the subject right requires transport outside prison walls to an unsecure medical facility of the prisoner's choosing without a determination that the procedure is a "serious medical need" invoking the protections of the Eighth Amendment prohibition on cruel and unusual punishment.

B. Other Decided and Currently Pending Cases

Courts faced with this issue have expressly recognized the split between *Monmouth* and *Victoria W.*[8] The trial court in the present case declared: "[T]his court finds the reasoning in *Monmouth County* more persuasive

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[8] Two federal district courts addressing similar jail policies after *Monmouth* adopted its holding without conducting any further inquiry because *Victoria W* had not yet been decided. *See Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999); *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459, at *1 (S.D. Ohio Jan. 10, 2001).

than *Victoria W.*" *Arpaio I*, 2005 WL 2173988 at *3. App. D. *See also Roe v. Crawford*, 439 F. Supp. 2d 942 (W.D. Mo. 2006) (implicitly rejecting *Victoria W* by citing and relying exclusively on *Monmouth*). The Eighth Circuit is currently considering a similar prison policy on appeal in *Crawford v. Roe*, No. 06-3108 (8th Cir. 2007), and will be issuing yet another decision regarding the questions presented by this case (oral argument in *Crawford* took place on September 24, 2007).[9] Granting review in this case would thus resolve the clear split between the Fifth and the Third Circuits before the federal courts become even further divided.

III.
THE LOWER COURT ANALYSIS IN THIS CASE WAS MANIFESTLY ERRONEOUS

Review is also needed because, in this case, the Arizona courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10(c).

A. Arizona Courts' Manifestly Erroneous Undue Burden Analysis

In affirming the injunction prohibiting the County from enforcing its policy in this case, the Arizona courts made two fundamental errors of federal constitutional law. First, purportedly applying the "undue burden" test to invalidate the policy as unconstitutional, the trial court here ruled that "any delay" would necessar-

[9] Oral argument before the Eighth Circuit in *Crawford v. Roe* can be reviewed at *http://www.ca8.uscourts.gov/oralargs/oaFrame.html.*

ily constitute an undue burden. "Since abortions are so time sensitive, any delay will inevitabl[y] result in an undue burden." *Arpaio I*, 2005 WL 2173988 at *1 (emphasis added). App. D. The trial court's ruling in this regard directly contravenes existing Supreme Court precedent. *See Casey*, 505 U.S. at 873-75 ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue," and "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right."). The Arizona Court of Appeals not only failed to reverse this legal error, but added its own by refusing to conduct any constitutional analysis at all, concluding that *Casey* did not apply. "We conclude that the undue burden test does not apply to the Policy at issue." *Arpaio II*, 214 Ariz. at 241, 150 P.3d at 1262. App. B. The Arizona Court of Appeals ruled that *Casey* and *Turner* were "alternative" rather than "sequential" tests. Thus, the court below held that a prison regulation is subject to judicial scrutiny under *Turner* regardless of whether the subject regulation infringes any constitutional rights at all.

B. The Lower Court Substitued Its "Easy Alternative" and Defied the Deference Required by a Proper Application of *Turner*

The second error manifest in the Arizona court's opinion is the lack of deference given to the decisions of the prison officials here. Instead ‹ 439 F. Supp. the County defendants' expert judgment, the Arizona Court of Appeals substituted its own "easy alternative" to replace the prison's policy now enjoined. "[W]e determine that there is an obvious, easy alternative." 214 Ariz. at

246, 150 P.3d at 1267. "[I]n doing so, it placed too high an evidentiary burden upon the [County]," and "offer[ed] too little deference to the judgment of prison officials about such matters." *Beard*, 126 S. Ct. at 2581. Irrespective of the "determination" that there was an "obvious easy alternative," Arizona courts are not at liberty to ignore the sound reasoning offered to support the Policy here and substitute a different policy in its place. *Overton*, 539 U.S. at 132 ("We must accord substantial deference to the professional judgment of prison administrators who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."). Once it found a rational connection between the Policy and the interests offered to justify it, "its inquiry should have ended. The court's further 'balancing' resulted in an impermissible substitution of its view on the proper administration of [the Maricopa County Jail] for that of experienced administrators of that facility." *Block v. Rutherford*, 468 U.S. 576, 589 (1984).

The erroneous analysis employed to invalidate the Maricopa County prison policy prohibiting prisoner transport for elective medical procedures (including abortions) is further support for this Court's review as the court of last resort. It demonstrates why review of the important questions presented as well as reversal of the Arizona courts' erroneous conclusions on those questions is now needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 21, 2007

APPENDIX A

[Filed Sept. 26, 2007]

[SEAL]

SUPREME COURT
STATE OF ARIZONA

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1501 West Washington Street
Phoenix, Arizona 85007-3231
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Kathleen E. Kempley
Chief Deputy Clerk

Rachelle M. Resnick
Clerk of the Court

September 26, 2007

RE: JANE DOE v JOSEPH ARPAIO/MARICOPA COUNTY
Arizona Supreme Court No. CV-07-0104-PR
Court of Appeals Division One No. 1 CA-CV 05-0835
Maricopa County Superior Court No. CV 2004-009286

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 26, 2007, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellee Jane Doe] = GRANTED.

Justice Bales did not participate in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 26th day of September, 2007.

Rachelle M Resnick, Clerk

TO:
Brigitte Adrienne Amiri
Susan M Freeman, Lewis and Roca LLP
Daryl Manhart, Burch & Cracchiolo PA
Nikolas T Nikas
John J Jakubczyk, John J Jakubczyk Attorney at Law
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Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix

cf

APPENDIX B

[Filed Jan 23 2007]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CV 05-0835

DEPARTMENT C

JANE DOE, individually and on behalf of all others similarly situated,

Plaintiffs/Appellees,

v.

JOSEPH ARPAIO, Maricopa County Sheriff, in his official capacity; MARICOPA COUNTY,

Defendants/Appellantts.

Appeal from the Superior Court in Maricopa County
Cause No. CV 2004-009286
The Honorable Barry C. Schneider, Judge

O P I N I O N

AFFIRMED

American Civil Liberties Union Foundation — New York, NY
By Brigitte A. Amiri
Jennifer McAllister-Nevins
Susan Talcott Camp
Charu Chandrasekhar
Co-Counsel for Plaintiffs/Appellees

Lewis and Roca LLP — Phoenix
By Susan M. Freeman
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Burch & Cracchiolo PA — Phoenix
By Daryl Manhart
Stasy D. Knight-Click
Counsel for Defendants/Appellants

I R V I N E, Presiding Judge

¶ 1 It is well-established law that certain constitutional rights of prison inmates may be curtailed to satisfy legitimate penological interests. This case involves an inmate[1] who asked to be transported to a location outside the jail so she could obtain a first-trimester abortion at her own expense. She was also willing to pay any security and transportation costs. Maricopa County and Joseph Arpaio, in his official capacity as the Maricopa County Sheriff (collectively "the County"), had no objection to the request, but required her to first obtain a court order directing the transportation. The central issue before us is whether requiring a court order to transport an inmate

[1] The trial court allowed plaintiff Jane Doe to proceed pseudonymously. We continue that usage.

to receive an abortion serves a legitimate penological interest. We hold that it does not, and affirm the judgment of the superior court.

BACKGROUND

¶ 2 The County operates several jail facilities in Maricopa County that house pre-trial detainess and sentenced inmates who are not transferred to the Arizona Department of Corrections. Correctional Health Services ("CHS"), an agency of the County, provides medical care to the inmates in the jail facilities, and also in a secure ward of the county hospital. When an inmate requires medical services beyond the capacity of the on-site CHS personnel, CHS arranges for the County to transport the inmate to an off-site medical facility.

¶ 3 CHS only performs, and only seeks transportation for, procedures CHS deems medically necessary. Accordingly, CHS provides pre-natal care and delivery services to pregnant inmates, but does not provide non-therapeutic abortion services.

¶ 4 The County has an unwritten policy that prohibits transportation of inmates off-site for elective medical procedures (the "Policy"). As a result of the Policy, an inmate may only obtain a non-therapeutic abortion by securing a court order directing the County to transport her off-site for the procedure.[2] The County requires the inmate to make her own financial arrangements for the

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[2]The County attempts to recast the Policy as one that permits transportation for abortion services if the inmate obtains a court order. This is a misleading characterization, however, as the County must comply with a court order directing it to transport an inmate or risk being held in contempt of court. *See*

[footnote continued]

procedure and to pay the cost of security and transportation.

¶ 5 Doe discovered she was pregnant shortly before the County took her into custody on March 18, 2004 after she was sentenced to four months in the County jail.[3] CHS personnel confirmed Doe's pregnancy by medical examination during her first week of incarceration. She immediately and repeatedly informed CHS medical personnel that she desired to terminate the pregnancy. Consistent with the Policy, the County refused to transport Doe for an abortion procedure.

¶ 6 For reasons mostly beyond her control, it took Doe seven weeks to obtain a court order. The superior court commissioner who sentenced Doe denied Doe's initial request for a court order directing the County to transport Doe for the procedure, stating, "I have been told that this Court and this County does not involve itself usually in transporting or assisting inmates in having elective medical procedures performed." Doe eventually, on May 12, 2004, obtained an order from the superior court that required the County to transport her to have the abortion procedure.

Holt v. Hotham, 197 Ariz. 614, 616, ¶11, 5 P.3d 948, 950 (App. 2000) (stating civil contempt arises when a party refuses to perform an act he is lawfully ordered to perform; the power to punish contempt is inherent in the trial court). The County does not adequately accommodate the exercise of an inmate's constitutional rights by simply recognizing that the courts are available to enforce those rights.

[3] Doe asked the prosecutor to delay the sentencing, but the prosecutor refused, telling her that she could obtain an abortion while on work furlough release. Although Doe was eligible for work furlough, when jail personnel learned she was pregnant, they transferred her to a dorm in the jail from which she could not participate in work furlough. In this dorm, her access to telephones was limited.

¶ 7 In conjunction with her request for an order, Doe filed a complaint seeking a declaratory judgment that the Policy was unconstitutional and alleging claims under 42 United States Code section 1983 (1996) for violation of plaintiffs' rights to privacy under the Fourteenth Amendment of the United States Constitution and violation of plaintiffs' rights to adequate medical care under the Eighth Amendment of the United States Constitution.[4] Doe also sought a permanent injunction enjoining the County from enforcing the Policy insofar as it would deny plaintiffs access to safe, timely and legal abortions.

¶ 8 The parties cross-moved for summary judgment. The superior court granted Doe's motion for summary judgment and denied the County's motion, ruling that the Policy was unconstitutional because it constituted an "undue burden" on a woman's right to choose to have an abortion and because it found the Policy served no legitimate penological purpose.

¶ 9 The superior court entered judgment in favor of Doe and permanently enjoined the County from enforcing the Policy insofar as it applies to an inmate seeking an abortion. The county timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

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[4] Doe brought her complaint on behalf of all those similarly situated. The trial court ruled that given the limited duration of a woman's pregnancy and the limited duration of County jail sentences, the mootness doctrine did not prevent the court from addressing Doe's cause of action on the merits.

DISCUSSION

¶ 10 A court may grant summary judgment when "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We view the evidence in the light most favorable to the County, against which judgment was entered, and determine de novo whether there are genuine issues of material fact and whether the trial court erred in its application of the law. *Salib v. City of Mesa*, 212 Ariz. 446, 450, ¶ 4, 133 P.3d 756, 760 (App. 2006).

¶ 11 Doe alleged, and the superior court found, that the Policy violates a woman's Fourteenth Amendment right to choose to have an abortion, as articulated by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 153-54 (1973), and reaffirmed by the Court in *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). The trial court also concluded that the Policy served no reasonable penological interest, citing the four-part test developed in *Turner v. Safley*, 482 U.S. 78, 84 (1987). The County contends these rulings were in error.

¶ 12 As an initial matter, we recognize that the County's Policy does not apply solely to abortion procedures, but prohibits the transportation of inmates off-site for any elective medical procedure. Doe challenges the Policy only insofar as it applies to inmates seeking a non-therapeutic abortion. The interests at stake, and the constitutional analysis of any rights associated with such interests, will necessarily depend on the specific elective procedure sought. An inmate will not be prejudiced by having to wait until after release to obtain most elective medical procedures, but the Supreme Court has recognized that involuntary delays in obtaining an abortion

have constitutional significance because "time is likely to be of the essence in an abortion decision." *H.L. v. Matheson*, 450 U.S. 398, 412 (1981); *see also Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513-14 (1990) (recognizing that a statutory judicial bypass procedure must mandate an expeditious process "to allow . . . an effective opportunity to obtain the abortion"). Accordingly, we limit our discussion of the Policy to its application to prohibit the transportation of inmates for elective abortion services.

A. Undue Burden Test

¶ 13 The parties present divergent views of the standard we should apply to review the Policy. Doe argues we must apply the "undue burden" test articulated in *Casey*. The County maintains, however, that because the Policy is a prison regulation, even if we determine the Policy imposes an "undue burden," we must defer to the County's discretion if the Policy reasonably relates to a legitimate penological interest under *Turner*. The county contends the trial court erred by evaluating the Policy under both tests, and asserts that the trial court should have concluded that the Policy does not constitute an "undue burden" and ended its inquiry.[5] To determine which standard applies, we evaluate the

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[5]The County also argues that we must first apply the undue burden test, and only if we find that the Policy constitutes an undue burden on inmates' rights to choose to have an abortion may we then examine whether the Policy is valid under *Turner* as a regulation reasonably related to legitimate penological interests. Courts, however, have applied the tests set forth in *Casey* and *Turner* as alternative, not sequential measures. *See Roe v. Crawford*, 439 F. Supp. 2d 942, 947-49 (W.D. Mo. 2006), *appeal filed*; *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004). We agree with this approach.

nature of the right to choose to have an abortion and the extent to which jail officials may restrict inmates' constitutional rights.

¶14 Imprisonment does not automatically deprive a prisoner of his or her constitutional rights or claims. *Turner*, 482 U.S. at 84. Nevertheless, imprisonment allows the government to impose greater restrictions on the exercise of constitutional rights than would otherwise be valid, and many constitutional rights enjoyed prior to incarceration are limited or lost upon imprisonment. *See Beard v. Banks*, 126 S. Ct. 2572, 2577-78 (2006) (stating the Constitution permits greater restriction of prisoners' rights). The United States Supreme Court ruled in *Turner* that a prison regulation that impinges on inmates' constitutional rights might nonetheless be valid if the regulation "is reasonably related to legitimate penological interests," and is not an "exaggerated response" to the regulation's objectives. 482 U.S. at 89-91. The County urges us to apply this standard to evaluate the Policy.

¶15 Doe argues, however, that pursuant to the United States Supreme Court decision in *Johnson v. California*, 543 U.S. 499 (2005), the Policy is subject only to the standard of review applicable to restrictions on the right to choose to terminate a pregnancy outside the prison context, specifically, the "undue burden" test. In *Johnson*, the Court held that a prison regulation requiring segregation of inmates on the basis of race should be analyzed under the strict-scrutiny test otherwise applicable to policies based on racial classifications, not pursuant to the more deferential *Turner* reasonable-relationship test. *Id.* at 512. The Court reasoned that it had applied *Turner's* reasonable-relationship test only to rights that are "inconsistent with proper incarceration," because those

rights may be limited in the prison context, but that the logic of *Turner* did not apply to the segregation policy because the right to be free from racial discrimination "need not necessarily be compromised for the sake of proper prison administration." *Id.* at 510 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)). Doe claims that a woman's right to choose to terminate her pregnancy, like the right to be free from racial discrimination, is not inconsistent with incarceration, bears no relationship to the goals of criminal deterrence or social isolation, and implicates no security concerns. Doe thus urges us to apply the undue burden test to evaluate the County's Policy.

¶ 16 We conclude that the undue burden test does not apply to the Policy at issue. The Supreme Court's decision in *Johnson* did not overrule the numerous cases in which the Court has consistently held that incarceration limits many privileges and rights. *Id.* Indeed, the Court in *Johnson* expressly acknowledged many appropriate prison restrictions on constitutionally protected rights, including restrictions on freedom of association, limitations on inmate correspondence, restrictions on inmates' access to courts, restrictions on receipt of subscription publications, work rules limiting prisoners' attendance at religious services, the involuntary medication of mentally ill prisoners and restrictions on the right to marry. *Id.* We believe that Doe's claim challenging the County's restrictions on a woman's right to terminate her pregnancy is not analogous to the equal protection challenge to a race-based prison regulation at issue in *Johnson*. As *Johnson* shows, distinctions based on race are inherently suspect, but the Supreme Court has recognized that the right to an abortion is not unlimited. Accordingly, we analyze Doe's Fourteenth

Amendment claim by applying the four-part *Turner* test to determine whether the Policy is a valid regulation of inmates' rights. *Accord Roe*, 439 F. Supp. 2d at 948 (declining to interpret *Johnson* to require the application of the *Casey* undue burden test, rather than the *Turner* reasonable relationship test, to a prison regulation prohibiting transportation of inmates for abortion care).

B. *Turner* Analysis

¶17 The United States Supreme Court held in *Turner* that several factors are relevant in determining whether a policy that restricts inmates' constitutional rights is valid as a regulation reasonably related to a legitimate penological interest. These factors, commonly known as the *Turner* test, are (1) whether there is a "valid, rational connection" between the prison regulation and the legitimate, neutral governmental objective advanced as its justification; (2) whether the inmates have an alternative means of exercising the restricted right; (3) the impact of accommodation of the right on prison resources; and (4) whether alternatives to the policy exist that would accommodate the inmates' rights at de minimis cost to penological interests. *Id.* at 89-91 (citations omitted). The County contends that consideration of these factors weighs in favor of the Policy and argues that the trial court erred by failing to give appropriate deference to the expertise and judgment of the County's jail administrators.

¶18 We examine each factor in turn, affording "substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132 (holding regu-

lation limiting prison visitation rights did not violate First Amendment's guarantee of free association). We are mindful, however, that in this case the County has effectively declined to exercise its professional judgment. The County has simply left to the courts the security and resource issues it asserts should control the decision whether it is necessary to transport an inmate. Because of this, our deference to the objectives presented by the County is confined to its decision to require a court order.

1. Whether the Policy Bears a Reasonable Relationship to Legitimate Penological Interests

¶ 19 The County advances several penological justifications for the Policy. Specifically, the safety/security of inmates and others, conservation of government resources, limitation of the County's liability exposure, and ensuring that prison officials do not violate Arizona law.

a. Safety and Security Concerns

¶ 20 Safety and security considerations properly underlie all County transportation regulations and policies, and constitute legitimate governmental interests. *See Overton*, 539 U.S. at 133 (stating that promoting internal security is perhaps the most legitimate of all penological goals). The County claims that the Policy furthers its security concerns because it requires the superior court to examine the reasons advanced by the inmate for transportation and to determine whether the transportation is necessary. Doe argues that the evidence does not support the County's proffered security justification.

¶ 21 The County frequently transports inmates for court appearances, compassionate visits (visits with dying family members or for funeral services), and for non-emergency medical care that CHS deems necessary. The County performs many of these transports voluntarily, without a court order.

¶ 22 We find no evidence in the record that an increased risk of a security breach exists when the County transports an inmate for a non-therapeutic abortion compared to transportation for any other reason. Indeed, the County acknowledged that transporting inmates for abortion services is no more secure if done pursuant to court order, as the County now does, rather than voluntarily. Moreover, Frank Kelch, the former Captain and Division Commander for the County's Security and Transport Division, testified that he is aware of only four or five transports for non-therapeutic abortions since the County instituted the Policy approximately fifteen years ago.

¶ 23 We recognize that the County may have a legitimate security interest in keeping the number of inmate transports to a minimum. *See, e.g., Victoria W.*, 369 F.3d at 486-87 (holding requirement that prisoners obtain court order for elective medical procedures, including abortion, was reasonably related to legitimate security concerns because it aimed to reduce the total number of off-site transports). Nevertheless, the County fails to present any evidence that the Policy in any way addresses its security concerns. "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

¶24 The County did not object to transporting Doe on security grounds and apparently has never raised a security objection to transporting any inmate seeking an abortion. Given that the County, not the court, has expertise in security, we fail to see how requiring a court order furthers any legitimate security interest. In any event, the County can address any security concerns relating to a particular inmate as an administrative matter soon after the inmate first requests transportation. If, as in this case, the County has no security concerns, the transportation may proceed. If security issues exist, the County can inform the inmate, and solutions may possibly be fashioned. Therefore, we reject the County's claim that requiring a court order satisfies a legitimate penological interest in security.

b. Conservation of County Resources[6]

¶25 The County asserts that the Policy is necessary for conservation of County resources. Doe argues that this argument is more properly addressed under the third *Turner* prong regarding whether accommodation will have a significant impact on prison staff. We agree that the County's interest in conservation of prison resources may directly affect the security, and other resources available to the jail facilities. We are mindful, however, that "where conditions within a prison facility are

[6] Doe urges us to decline to consider this argument because, she claims, the County did not raise it in the trial court. Although the County did not use the specific phrase "conservation of resources," it did discuss in its trial court pleadings that the Policy limiting transports for elective medical procedures allowed the County to concentrate on transporting inmates to court appearances and "necessary" medical appointments. Thus, the County sufficiently preserved this argument for appeal.

challenged as constitutionally inadequate, courts have been reluctant to consider costs to the institution a major factor in determining whether a constitutional violation exists." *Monmouth*, 834 F.2d at 336.

¶26 The County maintains that the Policy is necessary to conserve County resources because it limits transports for non-medically necessary procedures and thereby "allows the [County] to focus on the mandated transportations, such as transporting inmates back and forth from court or to medical appointments that are medically necessary." The County admits that only five or six inmates have obtained a court order for transportation for abortion services since the County implemented the Policy in 1990. Compared to the number of transports the County performs for court appearances, compassionate visits, and what it deems necessary medical care, the demand for transportation for abortion services is de minimis. Moreover, the County presents no evidence that the cost for these transports significantly impacts the County's security or transportation costs, nor do we see how it could as the County requires that inmates transported for non-therapeutic abortion procedures reimburse the County for security and transportation costs.[7]

¶27 In addition, it is not clear that the Policy, as applied to transportation for abortion services, reduces these costs. As the County must comply with a court order directing it to transport an inmate for abortion services, see *Holt*, 197 Ariz. at 616, ¶11, 5 P.3d at 950,

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[7] For inmates such as Doe, who are eligible for work furlough release, it is possible that security is unnecessary and the inmate could arrange her own transportation. This is the kind of detail the County is best equipped to address.

the Policy does not allow the County to wholly avoid the costs associated with transports for abortion services. Further, as Doe points out, if an inmate is unable to obtain an abortion, the County will expend resources fulfilling its responsibility to provide her proper pre-natal, delivery and post-natal medical care, a cost that may equal or exceed the cost associated with transportation for abortion services. *E.g.*, *Monmouth*, 834 F.2d at 341 (stating that accommodation for abortion services imposes no greater burden on the government than already exists under its responsibility to provide proper pre- and post-natal care to pregnant inmates).

¶ 28 Therefore, we find that the evidence does not establish a logical connection between the Policy and the County's objective of conserving its resources.

c. Liability Concerns

¶ 29 The County next argues that the Policy reduces its liability exposure by limiting: (1) liability to third parties who object to the inmates' abortion; (2) liability to third parties for harm caused by an escaping or escaped inmate; and (3) liability to the inmate for health complications that arise before, during or after the abortion. In essence, the County suggests that its liability exposure is reduced if it "involuntarily" transports an inmate pursuant to a court order rather than voluntarily honoring the inmate's request for transportation.

¶ 30 The County's argument that the Policy limits the County's liability to third parties who may object to an inmate obtaining an abortion is unpersuasive. The County cites no such cause of action that might arise from its transportation of an inmate for an abortion procedure, and we know of no civil liability created by

assisting a woman to obtain a legal abortion. Similarly, the County does not explain how it could be liable to an inmate for complications arising out of an abortion procedure performed by a third party medical practitioner selected and compensated by the inmate. These potential threats of vague or unknown liability are not sufficient to support the Policy.

¶ 31 The County's professed concerns regarding liability for the conduct of inmates during transportation are similarly unfounded, as Arizona law exempts public entities and their employees, in the absence of intentional conduct or gross negligence, from liability for injuries "caused by an escaping or escaped prisoner." A.R.S. §12-820.02(A)(2) (2003); *see generally Clouse v. Arizona Dep't of Pub. Safety*, 199 Ariz. 196, 16 P.3d 757 (2001). We note that this statute renders the circumstances in this case significantly different from those present in *Victoria W.*, where applicable Louisiana law exposed the prison to liability claims arising from the acts of escaped prisoners, a factor the court of appeals repeatedly cited as a justification for the regulation at issue. 369 F.3d at 486-87. Therefore, the County's Policy is not reasonably related to its proffered justification of reducing its liability exposure.

d. Avoiding Violations of Arizona law

¶ 32 Finally, the County claims that the Policy advances its interest in ensuring that jail officials do not violate Arizona law. Specifically, the County cites A.R.S. §35-196.02 (2000),[8] which states that public funds

[8]This statute was held to be unconstitutional as applied to a context and for reasons distinguishable from this case. *Simat Corp. v. Ariz. Health Care*, 203 Ariz. 454, 56 P.3d 28 (2002).

may not be "expended for payment to any person or entity for the performance of any abortion unless an abortion is necessary to save the life of the woman having the abortion."

¶ 33 The County expends no public funds for abortion procedures as it requires an inmate seeking to terminate her pregnancy to bear the cost of the abortion services as well as the related security and transportation costs. Moreover, if the County's concern were valid, it would be in violation of the statute even if a court ordered the transportation. The record shows, however, that the County has never opposed an inmate's request for a court order requiring it to transport the inmate for abortion services on the basis that the public funds statute prohibits the transportation of inmates for abortion services.

¶ 34 Thus, we find that the Policy is not reasonably related to the County's objective of avoiding violations of law.

2. Whether Inmates Have Alternative Means To Exercise Their Right

¶ 35 The County argues that we should sustain the Policy because an alternative procedure allows inmates to exercise their right to choose to have an abortion; namely, an inmate may seek an order from the superior court directing the County to transport the inmate for an abortion procedure. Doe responds, however, that because an inmate is unable to obtain an abortion within the jail facilities, pregnant inmates have no alternative means to exercise their right to choose to terminate their pregnancies. To sustain the Policy, we need not find that inmates' alternatives are ideal; we need only determine that alternatives are available. *Overton*, 539 U.S. at 135.

¶ 36 The County contends that the Policy is akin to the judicial bypass procedure specified in certain state laws that restrict a minor's ability to obtain an abortion without parental consent. Such laws have been held to be valid if a minor is permitted to petition a court to obtain authorization for an abortion in lieu of obtaining the requisite parental consent for the procedure. *See Bellotti v. Baird*, 443 U.S. 622, 643, 649 (1979); *Casey*, 505 U.S. at 899; *Planned Parenthood of S. Ariz. v. LaWall*, 307 F.3d 783, 7899 (9th Cir. 2002) (holding Arizona's judicial bypass provision adequately protected minors' right to choose).

¶ 37 Regulations affecting minors implicate different concerns, and may justifiably be broader, than those applicable to adult women. *See Casey*, 505 U.S. at 895, 898 (stating that assumptions regarding the need for consultation that may be reasonably adopted with respect to minors cannot also be applied to adult women and invalidating statute requiring spousal notification before abortion procedure); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976) (holding that the United States Constitution does not permit a state to require a married woman to obtain her husband's consent before undergoing an abortion). We are therefore unpersuaded by the County's argument that refusing to transport inmates for an abortion procedure absent a court order is acceptable because a similar approach has been held valid when applied to minors.

¶ 38 Moreover, we are troubled by the absence of standards available to guide the superior court when it reviews an inmate's request for transportation. Although the County maintains that the court is not given a veto over an inmate's decision to terminate her pregnancy, it is evident that the court may in fact prevent an inmate

from obtaining an abortion by delaying or denying her request, thereby functioning as a gate-keeper with the ability to overrule her choice to have an abortion.[9] The evidence is that the number of such requests is very low and that the County has never contested an inmate's application for such transportation. Requiring a court order in the first instance for all inmates who desire access to abortion services unnecessarily limits such access. While we recognize that the County might decline to transport an inmate who presents a particular security or liability concern, an indiscriminate ban on all transportation for non-therapeutic abortions does not allow inmates sufficient alternative means to exercise their right to choose to have an abortion.

3. Impact Accommodation Would Have On Prison Resources

¶39 The County argues that making an exception to the Policy for requests for abortion procedures would greatly impact prison resources because each time the County transports a prisoner, extra personnel and resources are required. We agree with Doe that the undisputed evidence demonstrates that accommodating inmates' abortion rights would have a de minimis financial impact on the County's jail facilities given that the inmate bears the expense.

¶40 As discussed, the County regularly transports inmates for court appearances, compassionate visits and non-emergency, medically necessary treatment. Trans-

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[9] Our conclusion is further supported by the deposition testimony of Sheriff Arpaio that the County will only transport an inmate for abortion services pursuant to a court order because it "feel[s] more comfortable" if a court has issued such an order.

portation for abortion services are a negligible fraction of the overall transportation the County performs each year, and there is no evidence that the costs associated with this transportation are significantly higher than other transportation. *See, e.g., Victoria W.*, 369 F.3d at 486-88 (holding regulation requiring inmates to obtain a court order to obtain abortion services served prison's proffered economic justification when prisoners had to be escorted to a facility located one hour away). In addition, the County requires inmates to pay for the costs of security and transportation.

¶41 We find no evidence that providing transportation for abortion services without a court order would significantly and adversely affect County resources.

4. Absence Of Ready Alternatives

¶42 Finally, although the County contends that there is no alternative to the Policy, we determine that there is an obvious, easy alternative that accommodates a woman's right to choose to have an abortion and imposes a de minimis burden on the pursuit of the County's stated objectives; namely, the County may consider inmates' requests for transportation for abortion services at the administrative level, just as it now considers requests for compassionate visits. Any security or resource issues may be raised and addressed administratively, without imposing a burdensome requirement that an inmate first obtain a court order.[10] The County claims expertise on security and resource issues. It should exercise that expertise. It should be the County

[10] Indeed, as Doe points out, the Arizona State prison system and the Pima County jail system voluntarily transport inmates for abortion services.

that, in the first instance, addresses an inmate's request for transportation.[11]

CONCLUSION

¶43 After considering the *Turner* factors, we conclude that the Policy represents an "exaggerated response" to the County's proffered penological concerns and is invalid insofar as it applies to transportation for abortion services. 482 U.S. at 90-91. The evidence demonstrates that the County can fully accommodate Doe's abortion rights at de minimis cost to the penological interests articulated by the County. The Policy is therefore not reasonably related to the County's professed neutral objectives and is invalid. For the foregoing reasons, we affirm the superior court's order.

/s/ Patrick Irvine
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/ Susan A. Ehrlich
SUSAN A. EHRLICH, Judge

/s/ Margaret H. Downie
MARGARET H. DOWNIE, Judge[12]

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[11] The trial court's order enjoins the County "from directly or indirectly enforcing the unwritten policy described above or requiring a pregnant inmate in the Maricopa County jails to obtain a court order before she will be granted transportation to obtain an abortion." The superior court will plainly have the authority to enforce this order if the County unreasonably, or without reasons, refuses a transportation request.

[12] The Honorable Margaret H. Downie, Judge of the Maricopa County Superior Court, was authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §12-145 to -147 (2003).

APPENDIX C

[Filed Oct 31 2005]

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SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

No. CV2004-009286

JANE DOE, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

JOE ARPAIO, MARICOPA COUNTY SHERIFF,
in his official capacity; MARICOPA COUNTY,

Defendants.

ORDER

In accordance with this Court's Minute Entry, dated August 23, 2005, granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment,

IT IS HEREBY ORDERED granting Judgment in favor of Plaintiff and against Defendants on Plaintiff's claims for declaratory and permanent injunctive relief.

IT IS FURTHER ORDERED declaring unconstitutional Defendants' unwritten policy which requires a pregnant inmate in the Maricopa County jails who chooses to terminate her pregnancy to obtain a court order before she will be transported to obtain an abortion.

IT IS FURTHER ORDERED that Defendants Arpaio and Maricopa County and their representatives, agents, employees, or those persons acting in concert or participation with them, are permanently enjoined from directly or indirectly enforcing the unwritten policy described above or requiring a pregnant inmate in the Maricopa County jails to obtain a court order before she will be granted transportation to obtain an abortion.

IT IS FURTHER ORDERED that this permanent injunction shall remain in full force and effect unless and until modified by further order of this Court and that this Court shall retain jurisdiction of this action for the purpose of implementing and enforcing this final judgment.

IT IS FURTHER ORDERED awarding to Plaintiff reasonable attorneys' fees and costs incurred in this action pursuant to 42 U.S.C. §1988 and A.R.S. §12-341 and in the amount of $5,760.00 [/s/B.C.S.] for attorneys' fees and $2,218.25 for costs.

The Court has resolved all claims against all parties, and this is a final judgment.

IT IS HEREBY ORDERED that judgment be entered as set forth herein.

Dated this 27 day of October, 2005.

/s/ Barry C. Schneider
Honorable Barry C. Schneider
Judge of the Superior Court

APPENDIX D

[Filed Aug 25 2005]

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-009286

08/23/2005

CLERK OF THE COURT
C. Johnston
Deputy

HONORABLE BARRY C. SCHNEIDER

JANE DOE — SUSAN ANDERSON
JANE E REDDIN

v.

JOE ARPAIO, et al. — JOSEPH I VIGIL
SUSAN L. HABLE

MINUTE ENTRY

Plaintiff's Motion for Summary Judgment and Defendants' Cross-motion for Summary Judgment have been under advisement.

IT IS ORDERED GRANTING Plaintiff's Motion for Summary Judgment and **DENYING** Defendants' Motion for Summary Judgment.

As to the issue of mootness, the court agrees with Plaintiff that given the limited duration of women's pregnancies and the limited duration of jail sentences at the Maricopa County Jail, the mootness doctrine should not prevent the issues being addressed on their merits.

As noted by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 125 (1973): "Pregnancy provides a classic justification for non mootness. It truly could be capable of repetition, yet evading review."

Plaintiff challenges Defendant Arpaio's unwritten transportation policy which requires a court order to allow transport of an inmate to obtain an abortion. The policy provides no guidelines for the court to consider in deciding whether to allow transport or not. Defendants concede that they have never opposed any inmate's request for a transport order to obtain an abortion.

Defendants offer a number of purposes to be served by the policy. Defendants purposes include: (1) security of the inmates and others; (2) limiting liability exposure, *i.e.*, liability to third persons who may have an interest in the unborn fetus or for complications related to the abortion; and (3) ensuring that Defendants do not violate the law prohibiting the use of public funds for an abortion.

There is a question remaining as to the appropriate test to be used in determining the constitutional issue. There is the undue burden test articulated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Applying this test, the State may not adopt a regulation that places

a substantial obstacle in the path of a woman seeking an abortion. In this case, since the Plaintiff was incarcerated, there is the argument that the more restrictive test of *Turner v. Satley*, 482 U.S. 18 (1987) applies. The *Turner* test looks to whether a regulation reasonably relates to a legitimate penological interest. The first of four factors enunciated is whether the regulation has a "valid, rational connection" to a legitimate government interest. *Turner*, 482 U.S. at 89.

Defendants argue that the *Turner* analysis applies and rely heavily on the recent fifth circuit opinion in *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004). Plaintiff argues that no matter what test is applied the Defendants' policy cannot pass constitutional muster. Plaintiff relies heavily on *Monmouth County Correctional Institutional Inmates V. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987).

If the undue burden test is applied, Plaintiff argues that forcing a pregnant inmate to obtain a court order unduly burdens the inmate. Since abortions are so time sensitive, any delay will inevitable result in an undue burden. We need to look only to the facts of this case to appreciate why this is true. Initially, the request for a court order was denied. It took several weeks, and then just before the end of the first trimester, until the second judge fortunately intervened and signed the order. The court agrees with Plaintiff that if this test applied, the policy is unconstitutional.

Even if the *Turner* test applies, Plaintiff argues that no reasonable penological purposes are served by the policy. The court also agrees with this argument.

Applying the Turner test, what is significant to the court, as pointed out by Plaintiff, is that there is no policy requiring a court order for the transport of inmates

for special events such as visiting sick relatives, attending viewings of deceased relatives, or hearing a will read. How then can there be a reasonable legitimate penological interest in the security of inmates if one category of inmates must obtain a court order and inmates in the other categories are not similarly restricted? How, also, can there be a reasonable interest in security if Defendants never oppose a request for a court order for transport and offer the court no guidelines to inform its decision? The true answer to these questions is that while Defendants mouth concerns for security, what is actually at stake is an interest to deflect what may be politically unpopular decisions and put those decisions at the feet of the court. Even assuming that this court is being unduly harsh and skeptical in attributing these political concerns to Defendants, the court agrees with the analysis of the majority in *Monmouth County* that when the decision to require a court order depends on the nature of the treatment or reason for transport, and, not the security risk imposed by the individual inmate, there is no legitimate penological purpose. *Monmouth County*, 834 F.2d at 338.

With respect to the liability concerns of third persons who may have an interest in the fetus, Defendants argue that the requirement of a court order eliminates any exposure. How can that be when these third persons are not given notice of the request for the transport order? How can a court order create immunity and be binding against such third persons when these persons were never given an opportunity to be heard? The answer is that the requirement of a court order cannot eliminate whatever rights these third persons may have. Perhaps more importantly, Defendants have no answer to the argument

and authority of Plaintiff that these third persons possess no right to veto a mother's decision to abort.

Similarly, the signing of a court order cannot result in the grant of immunity to the Defendants if complications arise during or after the procedure.

As to the third purpose, the avoidance of Defendants violating the law prohibiting expenditure of funds for an abortion, this concern loses its validity as long as the inmate arranges to pay for the producers, as occurred in this case. Also, the law prohibits public funds being "expended for payment to any person or entity for the performance of an abortion." A.R.S. §35-196.02. Providing transportation is not paying for the performance of an abortion.

It is noted that another purpose has been offered by Defendants through the deposition of the sheriff's director of intergovernmental affairs, but not included in their argument. That deponent also suggested that protecting the sheriff from adverse publicity justified the policy. Since this argument has apparently been abandoned, there is not need to address it.

As noted, Defendants rely on *Victoria W.* in which the fifth circuit upheld the constitutionality of a Louisiana prison policy requiring a court order to transport an inmate for an abortion. *Victoria W.* is distinguishable factually. The Plaintiff in that case sued for damages because she was unable to obtain the court order required by the County. Summary judgment was granted in favor of the defendants and affirmed on appeal. The transport would have involved a one-way, one-hour trip and a three night stay in the hospital. In this case, abortions are obtainable locally. In this case, Defendants permitted transports for other purposes without court order. Not so in *Victoria W.*

Even without the factual distinctions, this court finds the reasoning in *Monmouth County* more persuasive than *Victoria W.*